88-1332

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CONSTANTINE JOHN GEKAS, as TRUSTEE of MET-L-WOOD CORPORATION, Debtor,

Petitioner,

v.

FREDERICK L. PIPIN, *et al.,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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February 6, 1989

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QUESTIONS PRESENTED

1. Is a claim for fraud on the bankruptcy court stated under Rule 60(b), Fed. R. Civ. Pro., and Bankruptcy Rule 9024, where the Trustee alleged that the debtor, other parties and their lawyers concocted a successful hoax to remove assets from a bankrupt's estate (in part by rigging a bankruptcy sale of those assets), and then withheld the truth about that hoax from the creditors and the bankruptcy court during expedited hearings scheduled by improper ex parte contacts?

[Note: Petitioner reserves the right to argue Question 2 in the event certiorari is granted on the above question, but does not include Question 2 among the reasons for granting the writ.]

2. Does a fraudulently obtained bankruptcy order approving a sale of assets bar a Trustee from pursuing a civil damage action when that order was obtained in expedited hearings without notice to most of the bankrupt's creditors as a result of a fraudulent scheme by the bankrupt and others to control the sale?

LIST OF PARTIES

The parties below were the petitioner Constantine John Gekas, as trustee of Met-L-Wood Corporation, debtor and the respondents Frederick L. Pipin, Pipin Industries, Inc., Kewanee Corporation, Wall Systems Group, Inc., PLC Manufacturing Co., MorAmerica Capital Corporation, American National Bank and Trust Company of Chicago, Stephen M. Slavin, Coffield, Ungaretti, Harris & Slavin, Gerald L. Thompson, MLW Products, Inc., Met-L-Wood Corporation and Thomas Smith.

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This case presents this Court with the opportunity to consider the important doctrine of fraud upon the court, by reviewing the continued vitality of Hazel-Atlas v. Hartford-Empire Co., 322 U.S. 238 (1944), in light of judicial and scholarly criticism of that decision and modernization of that doctrine in closely related procedural and ethical contexts. 39

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSTANTINE JOHN GEKAS, as Trustee of Met-L-Wood Corporation, debtor,
Petitioner,

v.

FREDERICK L. PIPIN, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Constantine John Gekas, as Trustee of Met-L-Wood Corporation, debtor, respectfully prays that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on November 8, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit in two consolidated appeals affirming two orders of the United States District Court for the Northern District of Illinois is reported at 861 F. 2d 1012 and is reproduced in the appendix hereto.

One of those consolidated appeals involved a civil damage action (hereinafter called "the District Court action") which was filed by petitioner in the United States District Court for the Northern District of Illinois. In that case, the dismissal order of the District Court adopted an earlier Report and Recommendation by a Magistrate of that Court. Both the dismissal order and the Report of the Magistrate are unreported;

both are reproduced in the appendix hereto.

The other of those consolidated appeals involved the dismissal of a Rule 60(b) "fraud on the court" action (hereinafter called "the Rule 60(b) Bankruptcy action") filed by petitioner in the United States Bankruptcy Court for the Northern District of Illinois. That Rule 60(b) Bankruptcy action sought to vacate the December 11, 1984 Order of the same Court approving and confirming a sale of the assets of the bankrupt Met-L-Wood Corporation.

There were two lower court rulings in the Rule 60(b) Bankruptcy action: the first was an unreported oral ruling of the Bankruptcy Judge dismissing the Rule 60(b) Bankruptcy action (later memorialized by a brief written order); the second was a Memorandum Order of the United States

District Court for the Northern District of Illinois affirming the dismissal. The District Court's Opinion is reported at 80 Bankr. 912. That Opinion, and the oral ruling and written order of the Bankruptcy Court, are reproduced in the appendix hereto.

Also, central to this case is a December 11, 1984 Order of the same Bankruptcy Court Approving and Confirming a sale of most of the assets of the bankrupt Met-L-Wood Corporation. That order is included in the appendix.

JURISDICTION

The underlying bankruptcy case -- This case arises from a bankruptcy case -- known as In re Met-L-Wood Corporation, Debtor filed on December 6, 1984 -- which is still pending in the United States

Bankruptcy Court for the Northern District of Illinois. Jurisdiction over that bankruptcy case is vested in the United States District Court for the Northern District of Illinois, which, pursuant to 28 U.S.C. §157(a), referred that case to the Bankruptcy Court under that District Court's Local Rule 2.33.

The District Court Action -- Invoking jurisdiction under 28 U.S.C. §§1331 and 1334, 18 U.S.C. §1964, and under the doctrine of pendent jurisdiction, petitioner filed what was essentially a damage action in the United States District Court for the Northern District of Illinois. On January 6, 1988, the District Court dismissed that action on the basis of a Report and Recommendation of a Magistrate of that Court.

The Rule 60(b) Bankruptcy Action -- Jurisdiction over the Rule 60(b) Bankruptcy action was also vested in the Bankruptcy Court by 28 U.S.C. §157(a) and Local Rule 2.33 of the United States District Court for the Northern District of Illinois. The Rule 60(b) Bankruptcy action was commenced by petitioner and the Official Creditors' Committee on July 24, 1986, which sought to vacate a December 11, 1984 order of that Bankruptcy Court approving and confirming a sale of the assets of the bankrupt Met-L-Wood Corporation. That Rule 60(b) Bankruptcy action was dismissed by the Bankruptcy Court on May 19, 1987.

On petitioner's appeal, the United States District Court for the Northern District of Illinois on December 1, 1987, affirmed the Bankruptcy Court's dismissal

of the Rule 60(b) Bankruptcy action. Jurisdiction of the district court over that appeal from the Bankruptcy Court's dismissal was founded upon 28 U.S.C. §158(a).

The Consolidated Appeals -- Petitioner's appeals of both the above District Court orders were consolidated in the United States Court of Appeals for the Seventh Circuit, which on November 8, 1988 entered a judgment and opinion affirming the lower courts' actions. No petition for rehearing was sought.

The jurisdiction of this COurt to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Federal Rule of Civil Procedure 60. Relief from Judgment or Order

* * *

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of any adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the

power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Bankruptcy Rule 9024. **Relief from Judgment or Order.**

Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only with the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144 or § 1330.

STATEMENT OF THE CASE

Procedural Background

The Underlying Bankruptcy Case -- On Thursday, December 6, 1984, a Chicago-based corporation known as Met-L-Wood Corporation filed a bankruptcy petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court in Chicago, Illinois.

Five days later (including an intervening weekend), on Tuesday, December 11, 1984, the Bankruptcy Judge -- Hon. Charles B. McCormick -- to whom that case had been assigned, entered an order approving the sale of certain of Met-L-Wood's assets to one of respondents. That sale and that order are the central focus of this case.

A few months after the sale was approved and consummated, on motion of the

Official Creditors' Committee, the bankruptcy case was converted to a liquidation proceeding under Chapter 7 of the Bankruptcy Code. In due course, petitioner was elected permanent liquidation trustee.

After an investigation of some length, complexity and difficulty, petitioner commenced two actions attacking the bankruptcy sale on the grounds of fraud.

The District Court Action -- First, petitioner initiated the District Court action seeking damages from the persons involved in the sale.[1]

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[1] The District Court action alleged violations of the federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq., the prohibitions against collusive sales under Section 363(n) of the Bankruptcy Code and the Illinois Commercial Code, and of the Illinois Fraudulent Conveyance Act; and further sought damages under Illinois state law theories of common law breach of

(continued...)

The Rule 60(b) Bankruptcy Action -- Then, when those defendants asserted that the original December 11, 1984 sale approval order barred the damage action, petitioner, joined by the Creditors' Committee (who are no longer parties to these proceedings), filed the Rule 60(b) Bankruptcy action seeking to set aside the sale approval order on the grounds of fraud upon the Court, under Rule 60(b), Fed. R. Civ. Pro., made applicable to bankruptcy proceedings under Bankruptcy Rule 9024.

Both the District Court action and the Rule 60(b) Bankruptcy action never proceeded past the complaint stage; both were dismissed, albeit on different

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[1](...continued)
fiduciary duty and legal malpractice. All of the charges involved events surrounding and related to the sale.

grounds. The allegations of both cases, however, were identical, raising, as noted, serious questions of fraud.

A summary of the allegations of fraud is as follows:

Factual Background

The business of the bankrupt corporation Met-L-Wood was primarily the production of structural laminated panels for industrial and commercial use. Part of that business, i.e. the manufacture of truck trailer doors, under a system known as "Sea-Lok," was rather successful.

Met-L-Wood (a respondent in this Court) and its three sister corporations (also respondents) were wholly owned subsidiaries of an Illinois corporation known as Pipin Industries, Incorporated (also a respondent). All the corporations

were controlled by respondent Frederick L. Pipin.

The Pipin corporate empire was financed by two financial institutions: American National Bank and Trust Company of Chicago ("American National") and Moramerica Capital Corporation ("Moramerica"), whose loans to Met-L-Wood alone totalled over a million dollars. Those loans were fully secured by all Met-L-Wood's assets, including the Sea-Lok assets. Both lenders are respondents as well.

Pipin and his companies were represented by the law firm of Coffield Ungaretti Harris & Slavin (also a respondent); one of that firm's partners, one Stephen M. Slavin (also a respondent) served as counsel to the companies, for a time sat on the Board of Directors of Met-

L-Wood, and during the events herein served as Secretary of the company.

During 1984, certain events caused Met-L-Wood to slip into insolvency. As a result, American National and Moramerica began closely monitoring the financial condition of Met-L-Wood with a view to eventual foreclosure on the assets of the company. The banks had their own legal counsel: the lawyers for American National were members of a firm which, during the exact time period that the events in this case unfolded (it later turned out), had a surreptitious relationship in another case with the bankruptcy judge to whom this case was assigned. See In re Wisconsin Steel, 48 Bankr. 753 (N.D. Ill. 1985).

Because of Met-L-Wood's financial problems, Pipin began a search for a buyer of the company's assets. His objective

was complicated, but its essential purpose was to save the most valuable part of Met-L-Wood's business -- the Sea-Lok operations and assets -- but rescue those operations and assets from the claims of Met-L-Wood's unsecured creditors who were owed over $2.2 million. To that end, Pipin and the banks found a buyer -- one Gerald Thompson (also a respondent) who was an employee of one of Pipin's companies. Mr. Thompson was the perfect buyer because he was willing to purchase all of Met-L-Wood's assets for less than their real value, and then resell the Sea-Lok assets to Pipin also at a substantially reduced value.

The desired goal of the scheme was rather simple: the Sea-Lok assets were to be removed from Met-L-Wood to another of Pipin's companies. Other assets of the

company, primarily the accounts receivable were to pay off outstanding loans to the two lenders, and the valuable Sea-Lok assets were to be posted as security for the loans from those lenders to the other Pipin companies. The transfer of the Sea-Lok assets was to be accomplished without interruption of the Sea-Lok business, and in the end, the unsecured creditors were to be left unpaid.

To accomplish those ends, the respondents concocted and accomplished several schemes, as follows:

The Concealed Agreements between Pipin and Thompson -- First, respondents Pipin and Thompson agreed that Met-L-Wood would sell certain of Met-L-Wood's assets to Thompson. The two shopped for financing for Thompson's purchase, providing at least four institutions with extensive

information about Met-L-Wood and its Sea-Lok operations. They also agreed that Thompson could remain on Met-L-Wood's premises if the sale was successful. Further, Pipin informed American National of those arrangements and efforts. To effect this purchase, Thompson in fact organized a new corporation called MLW Products, Inc., the offices of which were located in the same premises as Mr. Pipin's companies.

Simultaneously, Pipin prepared to repurchase the Sea-Lok assets from Thompson. His lawyers at the Coffield firm incorporated a new company (respondent PLC Manufacturing) expressly for that purpose. He approached American National regarding financing the repurchase, and informed the Bank of his desires and intentions to retain control

of Sea-Lok and of the status of Thompson and his relationship with Pipin.

The Financing Scheme -- Meanwhile, Pipin and his two lenders, assisted by their lawyers, put a new security interest arrangement in place which was somewhat convoluted but which in its final result was simple: On the day before the Met-L-Wood bankruptcy petition was filed, another of Pipin's companies (respondent Wall Systems) had a new line of credit at American National which was guaranteed by Moramerica, and available to repurchase the Sea-Lok assets. Most importantly, the new arrangements granted both lenders security interests in any and all assets which Wall Systems might thereafter acquire.

As those events were progressing, the respondents began their more public

activities designed to accomplish their plan. American National and Moramerica declared their loans to Met-L-Wood to be in default and scheduled a Uniform Commercial Code foreclosure sale for Monday, December 10, 1984 at the law offices of American National's lawyers. Met-L-Wood formally acceded to the notices of default, admitted its inability to cure the default and stated its intention to so notify its unsecured creditors. However, only forty of Met-L-Wood's some 200 unsecured creditors were notified by mail.

At the same time, Pipin was attempting to ensure that the Sea-Lok business was not interrupted by what appeared to be a foreclosure that would end Met-L-Wood's business. To that end, he traveled to Detroit to inform Fruehauf Corporation, one of Met-L-Wood's best trailer door

customers, that his companies would be undergoing a "reorganization," and that within a short period of time, one of Pipin's other companies would be supplying trailer doors, including Sea-Lok doors.

American National then advertised the sale in the public press, but simultaneously, the respondents agreed that the true extent and value of the Sea-Lok and other Met-L-Wood assets would be withheld from Met-L-Wood's creditors and from any independent bidder who might appear at the sale. In fact, respondents concealed important information about the Met-L-Wood assets from the other bidders and the unsecured creditors.

On December 6, 1984, because of threats by its creditors of an involuntary bankruptcy, Met-L-Wood filed its bankruptcy petition. As chance would have

it, the case was assigned by lot to the Honorable Charles B. McCormick, the Bankruptcy Judge, the judge with whom American National's lawyers had a surreptitious arrangement in another case.

On that date, Met-L-Wood had approximately 201 general unsecured creditors, and a total unsecured debt of approximately $2.2 million.

The Rigged Inspection and Concealment of Assets -- That Friday, December 7, 1984, American National held an inspection of the Met-L-Wood assets at the company's premises.

A number of persons attended the inspection, but none were given the extensive information which respondents had about the assets. Indeed, without interference from the American National representative who was present during the

inspection, Pipin actively discouraged at least one bidder from a full inspection of the assets, especially the accounts receivable, which were to be offered for sale.

The Procurement of the Shill Bidder -- Meanwhile, Thompson had found another bank to finance his purchase of the Met-L-Wood assets. On Friday, December 7, 1984 (the day of the rigged inspection), he sought and obtained permission from that lender to purchase all of the Met-L-Wood assets, and to immediately resell the Sea-Lok assets to Pipin.

The same day, Pipin and his lawyer (the respondent Slavin) procured a shill bidder to attend the foreclosure sale. They chose the respondent Thomas Smith, who was sharing office space with Slavin's firm. Slavin prepared, and Pipin and Smith

signed, an agreement whereby Smith agreed to bid as an undisclosed agent for PLC Manufacturing, the new company Slavin's firm had formed to purchase the Sea-Lok assets.

The Ex Parte Contacts with Judge McCormick -- At that time, the law firm representing American National had been engaging in a series of ex parte contacts with Bankruptcy Judge McCormick in at least one other case pending before him. On behalf of American National, that firm also entered an appearance in the Met-L-Wood case.

On Thursday, December 6 or Friday December 7, 1984, American National, Pipin and Moramerica agreed to submit a motion to Judge McCormick seeking his authorization to proceed with the

foreclosure sale as scheduled on Monday, December 10, 1984.

Purporting to act on behalf of the three movants and on either December 6 or 7, 1984, someone contacted Judge McCormick, either personally or through his staff, and obtained a scheduling of that motion at 9:30 a.m. on Monday, December 10, 1984, out of the ordinary course of the Court's regular scheduling practice.

Met-L-Wood's new bankruptcy counsel then prepared what was styled as a "Joint Emergency Motion to Sell Assets Pursuant to Previously Advertised Sale." The motion papers were distributed for service late on the afternoon of Friday, December 7, to some but certainly not to all of the 201 creditors, many of whom had not

even received notice of the bankruptcy itself.[2]

The Foreclosure Sale -- The next Monday, December 10, 1984, the parties appeared before Judge McCormick. None of the schemes and arrangements were disclosed to Judge McCormick, and he permitted the sale to proceed.

Thereafter, the sale was conducted at the offices of American National's lawyers.

None of the foregoing agreements and concessions were disclosed to the other bidders. Moreover, American National specifically misrepresented some of the

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[2] The certificate of service attached to that Joint Motion purports to show the creditors to whom the Notice and Motion were sent and the means of that service. Those papers show that only ten of Met-L-Wood's 201 general unsecured creditors were purportedly given notice of the motion.

assets included in the Met-L-Wood estate. American National's lawyer, opened the sale in part by announcing that "the sale cannot be formally consummated . . . until confirmed by the bankruptcy court," and that "[t]he sale cannot close until Judge McCormick has confirmed the sale."

Thomas Smith, the shill bidder, was present. He falsely affirmed that he was attending the sale on his own behalf, when in fact he was in attendance pursuant to the agreement with Pipin. Pursuant to instructions from either Pipin or Slavin, Smith placed false and fraudulent bids, outbidding all bidders. Smith was the high bidder at the sale in the amount of $800,000. However, in fact, neither Smith nor his undisclosed principals (Pipin, PLC and Pipin Industries) had the financial

means or backing to pay that price for the assets.

After the sale, Pipin, Smith, Thompson and others unknown met at the offices of Met-L-Wood's bankruptcy counsel. An agreement was reached rejecting Smith's false bids, and awarding the sale by agreement to Thompson, who, of course had already agreed and arranged to resell the Sea-Lok operation back to Pipin.[3] They

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[3] In the meantime, Pipin had arranged for the Sea-Lok operations to continue without any interruption by the court proceedings and sale. He had transferred the Sea-Lok operations to another location, and arranged for an employee of Fruehauf, one of his best customers, to visit the new site, to observe his employees fabricating trailer doors intended for shipment to Fruehauf.

The next day, Tuesday, December 11, 1984, Pipin spoke by telephone with another employee of Fruehauf and told him that the Sea-Lok Door Company had been formed, was operating, and was producing trailer doors. Thereafter, Pipin and his companies shipped finished Sea-Lok Doors

(continued...)

also agreed that Met-L-Wood's accounts receivable would not be included in the sale to Thompson, but would remain in the estate to satisfy the loans of American National and Moramerica.

The next day, December 11, 1984, Judge McCormick held another hearing on the sale. Met-L-Wood, American National and Moramerica asked the Judge to approve the sale to Thompson. That hearing was adjourned to permit the attorney for a few unidentified creditors to communicate with

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[3](...continued)
to Fruehauf.

American National was aware of that phantom Sea-Lok operation because the Bank had established a secret lock box account under the name Sea-Lok Door Company -- a company which did not then exist. In fact, it was not until December 17, 1984, that a lawyer from the Coffield firm (who was also an officer of PLC Manufacturing) changed the name of PLC to Sea-Lok Door Company.

his clients about the proposed sale to Thompson. That afternoon, December 11, 1984, the final hearing was held. At neither of the December 11 hearings was Judge McCormick told the truth.

At the afternoon hearing, Judge McCormick entered the order approving the sale. In part, that Order made the following findings:

> [T]he highest and best offer received for the debtor's assets . . . was made by Gerald Thompson in the amount of $425,000 and it is in the best interest of the debtor, its creditors and other parties in interest that the sale to said Gerald Thompson be approved and confirmed.

At the very least, given the real events which were concealed from the Court and everyone else, that conclusion is subject to serious question, and is arguably flatly incorrect.

At none of the hearings before Judge McCormick was anything other than the unsworn statements of lawyers offered in support of the request to approve the sale. No discovery of any kind was taken by any party.

In the next few days, the prior arrangements were fully consummated. On December 12, Thompson bought all the Met-L-Wood assets sold by American National.

On December 13, using money from the line of credit in part related to the refinancing arrangement set up before the sale, Pipin repurchased the Sea-Lok assets from Thompson at substantially below their real value.

A few days later, Pipin and his lawyer Slavin, acting for the new owner of the Sea-Lok assets, executed papers perfecting American National's security interest over

the same Sea-Lok patents and trademarks which had been subject to American National's original security interest when held by Met-L-Wood.

By these means, respondents, accomplished their original purposes of moving the Sea-Lok assets to another of Pipin's companies subject to security interests of American National and Moramerica. Those new security interests were virtually identical to those the lenders had over the same assets when owned by Met-L-Wood.

Met-L-Wood's accounts receivable remained in the estate, were collected and satisfied in full the loans of American National and Moramerica, leaving only a pittance for the unsecured creditors. In the months that followed, Pipin operated

and then sold off the Sea-Lok assets at a substantial profit.

Thus, as Judge Posner vividly stated the matter (albeit only in the subjunctive), Pipin and the respondents "walk[ed] off with [Met-L-Wood's] principal assets for a song, shucking off the unsecured creditors in the process." 861 F.2d 1012, 1019 (7th Cir. 1988).

The Seventh Circuit's Opinion

The Seventh Circuit's opinion presents a two part analysis of the case.

First, the Court of Appeals dealt with the dismissal of petitioner's District Court damage action and concluded essentially that it was nothing more than a thinly disguised collateral attack on the December 11, 1984 sale approval order. The crux of the Seventh Circuit's holding was that petitioner's damage action was

barred because the sale approval order arose from

> "an in rem proceeding. It transfers property rights and property rights are good against the world, not just against parties to a judgment or persons with notice of the proceeding." 810 F.2d at 1017.

The Seventh Circuit did not support that conclusion with any authority. Indeed, the parties had not even briefed and argued the law of in rem proceedings. Instead, they had been solely concerned in the lower courts, and before the Seventh Circuit itself, with the question of whether the sale approval order barred the Trustee as a matter of the law of res judicata or collateral estoppel.[4]

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[4] The Magistrate's report and the District Court's Opinion dismissing petitioner's District Court action concluded in somewhat confused fashion that the Trustee was barred by res judicata and/or collateral estoppel.

On that point, the Seventh Circuit's opinion rather clearly disposed of respondents' arguments that petitioner was barred under those doctrines from pursuing his damage action. As Judge Posner concluded, the Trustee represented all of the creditors, including those who had no notice of the sale proceedings and no notice of the bankruptcy itself. Therefore,

> [I]n so far as [petitioner's] fraud suit is on their behalf too -- that is, on behalf of nonparties to the sale proceeding -- it is not barred by res judicata." Id.

Second, the Seventh Circuit concluded that the Trustee's Rule 60(b) Bankruptcy action was properly dismissed because it did not state a claim for fraud on the court, even though it did state a claim for fraud on the creditors.

The Court of Appeals concluded that Rule 60(b), as applied to bankruptcy proceedings by Bankruptcy Rule 9024 has supplanted and replaced the long recognized authority of a bankruptcy court to reconsider its orders, including judgments confirming sales, within a reasonable time. As the Court of Appeals held, "the old inherent power to reconsider bankruptcy orders has been merged into the rule." Id. at 1018.[5]

The Court of Appeals also concluded that even though there may have been fraud upon the creditors by respondents' shenanigans, there was no fraud upon the court within the meaning of that Rule. First, the Court of Appeals characterized

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[5] This issue was also not briefed by the parties.

the fraud on the court doctrine and this Court's central decision on that doctrine:

> Therefore, the courts have held that, other than in patent cases, where the 'fraud upon the court' doctrine has been generously interpreted because Patent Office proceedings are ex parte and patent monopolies may have consequences far beyond the parties to a particular infringement proceeding, see e.g. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) . . . the fraud must involve corruption of the judicial process itself. Id.

The Court of Appeals also concluded that the allegations of the ex parte contact with Judge McCormick to set up the expedited sale approval hearings did not state a claim for fraud on the Court. 861 F.2d at 1019. The Court of Appeals simply ignored the arguments of petitioner that his claim of fraud upon the court was based on the concocted schemes of respondents which were foisted on the creditors and the bankruptcy court.

In all of its conclusions, the Seventh Circuit's opinion is enlivened and directed by the importance of finality of court orders, especially of orders confirming bankruptcy sales. 861 F.2d at 1017, 1019.

The Seventh Circuit's opinion is striking for two other reasons: First, its tone and the statement of its rationale is almost apologetic, both in its invocation of the law of in rem proceedings[6] and its conclusion that fraud on the creditors is not fraud on the court.[7] Second, the Court of Appeals

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[6] "We are not just invoking legal theories sanctified by Latin tags. The considerations are pragmatic." 861 F.2d at 1017.

[7] "The result may seem a harsh one; it may seem to illustrate the penchant of

(continued...)

failed to apply the proper standard of review of dismissed complaints, i.e. that the allegations must be taken as true.

The Seventh Circuit accordingly affirmed the judgments of dismissal of both the petitioner's lawsuits.

REASONS FOR GRANTING THE WRIT

> This case presents this Court with the opportunity to consider the important doctrine of fraud upon the court, by reviewing the continued vitality of Hazel-Atlas v. Hartford-Empire Co., 322 U.S. 238 (1944), in light of judicial and scholarly criticism of that decision and modernization of that doctrine in closely related procedural and ethical contexts.

This case presents the Court with the opportunity to revisit an important area

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[7](...continued)
courts (as some would see it) to work injustice through technicalities." 861 F.2d at 1019.

of civil procedure -- fraud upon the court -- which it last authoritatively addressed forty-five years ago in Hazel-Atlas v. Hartford-Empire Co., 322 U.S. 238 (1944).

In Hazel-Atlas, certain officials and attorneys for a litigant in a patent infringement action secretly authored an article on the patent at issue, and published it under someone else's name. When the case was presented to the court of appeals, one of the counsel who had secretly authored the article successfully directed the court's attention to it as persuasive if not controlling secondary authority.

This Court's view of such fraud was firmly stated:

> This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here . . . we find a

> deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. . . . Proof of the scheme, and of its complete success up to date, is conclusive. 322 U.S. at 245-46.

Surprisingly, the lower federal courts and the commentators have criticized Hazel-Atlas. See USM Corp. v. SPS Technologies, Inc., 694 F.2d 505 (7th Cir. 1982)(Judge Posner); 7 Moore & Lucas, Moore's Federal Practice ¶ 60.33 at pp. 60-355 - 60-362 (1987); 11 Wright & Miller, Federal Practice and Procedure §2870 at pp. 255-56 (1973). Indeed, in affirming the dismissal of the Rule 60(b) Bankruptcy action in this case, District Judge Kocoras almost expressly declined to follow the holding of Hazel-Atlas, stating that "Hazel-Atlas is viewed by some to be an extreme and perhaps unjustified

application of the fraud upon the court doctrine." 80 Bankr. at 916.[8]

The bulk of the lower federal court decisions deal with the effect of the concealment of facts from a tribunal by a party or his attorney.[9] The cases generally conclude that such concealment of facts does not constitute fraud on the court.

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[8] The Seventh Circuit's treatment of Hazel-Atlas was more obscure. The Court of Appeals divined a narrow distinction that Hazel-Atlas was peculiarly limited to patent cases. 861 F.2d at 1018. That distinction is simply a flat misstatement of the holding in Hazel-Atlas.

[9] See M.W. Zack Metal Co. v. Int'l Medical Products, Inc., 675 F.2d 525 (2d Cir. 1982); Kerwit Medical Products, Inc. v. N & H Instruments, Inc., 616 F.2d 833 (5th Cir. 1980); Budge v. Post, 544 F. Supp. 370 (N.D. Ill. 1982); United States v. Int'l Telephone & Telegraph Co., 349 F. Supp. 22 (D. Conn. 1972), aff'd sub nom. Nader v. United States, 410 U.S. 919 (1973). See also Bulloch v. United States, 721 F.2d 713 (10th Cir. 1983).

However, this case falls squarely within the ambit of Hazel-Atlas in that the facts present a carefully crafted, sophisticated plan by litigants and their lawyers to concoct a fraudulent scheme and foist it on the bankruptcy court. To paraphrase the words of Justice Black, this is not a case of mere perjury or concealment, this is a case where a deliberately planned and carefully executed scheme defrauded the bankruptcy court.

The lower courts and authoritative commentators have recognized that fraud upon the court requires a showing of defilement of the judicial process, interference with the impartial decision-making process of the court, which constitutes fraud upon the court. The perpetrators may be the judicial officer,

or lawyers who are officers of the court. As the Seventh Circuit explained in Kenner v. Commissioner of Internal Revenue, 387 F.2d 689, 691 (7th Cir. 1968), fraud upon the court embraces

> ". . . only that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." [quoting an earlier edition of Moore's Federal Practice]

See also Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072 (2d Cir. 1972). 7 Moore & Lucas, Moore's Federal Practice ¶60.33 at pp. 60-359-60 (1987); 11 Wright & Miller, supra, §2870, at pp. 256-57 (1973).[10] Yet, the lower

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[10] As Professors Moore and Lucas state the matter: a lawyer's "loyalty to the court, as an officer thereof, demands integrity and honest dealing with the (continued...)

court cases do not explore the effect of misrepresentations or half-truths foisted upon a tribunal by litigants and their attorneys. In that vacuum, the continued vitality of Hazel-Atlas is subject to serious question.

Furthermore, although this Court held long ago that a federal court has the inherent power to investigate whether a judgment was obtained by fraud, Universal Oil Co. v. Root Refining Co., 328 U.S. 575 (1946), in this case, the Seventh Circuit

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[10](...continued)
court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court." 7 Moore & Lucas, supra ¶60.33 at 60-360. (footnote omitted).

Professors Wright and Miller suggest that the correct understanding of Hazel-Atlas, is that whether fraud on the court is established should depend on whether an attorney or other officer of the court was a party to the impropriety. 11 Wright & Miller, supra at 256.

expressly held that a bankruptcy court's authority to investigate such fraud has been supplanted by Rule 60(b), Fed. R. Civ. Pro.

The Seventh Circuit's conclusion on this point is directly in conflict with the terms and intent of Rule 60(b)'s provisions related to fraud on the court. Indeed, in 1946, two years after Hazel-Atlas, Rule 60(b) was amended to include the specific provisions relating to fraud upon the Court. The Notes of the Advisory Committee on Rules noted that "the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause," and specifically cites Hazel-Atlas "[a]s an illustration of this situation." Fed. R. Civ. Pro. 60 advisory

committee note.[11] Thus, the Seventh Circuit's opinion necessarily throws the powers of the court to deal with fraud into substantial confusion, and demonstrates the need to reevaluate the law of fraud on the court in light of the amendments to Rule 60(b) which postdate Hazel-Atlas.

Finally, the conclusions of the Seventh Circuit are in disharmony with developing and more modern concepts of fraud on the court. For example, the Restatement of Judgments in its text and comments contains a more modern test for fraud upon the court, establishing four elements required for vacating a fraudulently obtained order: materiality of the alleged

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[11] Rule 60(b) is made expressly applicable to bankruptcy proceedings by Bankruptcy Rule 9024.

fraud; diligence by the moving party both before and after the fraudulent judgment was entered, and a likelihood of success on the merits by clear and convincing evidence. Restatement of Judgments (Second) § 70 and comment d (1982).

Further, developing standards of legal ethics now suggest that the fraud upon the court doctrine should be construed in accord with the standard tort principles that statements of half-truths are as much fraudulent misrepresentations as if facts stated were untrue.[12] Equitable Life

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[12] §529. **Representation Misleading Because Incomplete**

> A representation stating the truth so far as its goes but which the maker knows or believes to be materially false or misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation. (emphasis supplied)

(continued...)

Insurance Co. v. Iowa, 312 U.S. 410, 425-26 (1941).

That standard of the tort law has been specifically included in the new American Bar Association Model Rules of Professional Conduct. Model Rules of Professional Conduct, American Bar Association, reprinted in Vol. VIII Martindale-Hubbell Law Directory (1988) (hereinafter "ABA Model Rules"). New Model Rule 3.3(a)(2), entitled "Candor Toward the Tribunal," prohibits a lawyer from knowingly "fail[ing] to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." As the Comment to the Rule provides: "[t]here are circumstances where

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[12](...continued)
Restatement of Torts (Second) §529 (1977)

failure to make a disclosure is the equivalent of an affirmative representation." Comment to ABA Model Rule 3.3. Those standards are in turn incorporated into Model Rule 1.2(d) which prohibits a lawyer from assisting a client to commit a fraud.

These new ethical considerations reflect the sharpening ethical focus on the types of blatant misrepresentations to the court, and the foisting of a hoax upon the court, exemplified by this case.

Petitioner urges this Court to take this opportunity to review this important area of federal procedure.

CONCLUSION

For these reasons petitioner urges this Court to grant this petition for certiorari. Petitioner reiterates that Question 2 is not advanced as a reason for granting the writ, but is necessarily included in this case for the full exposition and presentation of the issues justifying granting the writ.

Respectfully submitted,

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APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-3004

IN THE MATTER OF:
MET-L-WOOD CORPORATION,

Debtor.

APPEAL OF:
CONSTANTINE JOHN GEKAS, TRUSTEE.

No. 88-1051

CONSTANTINE JOHN GEKAS, TRUSTEE,

Plaintiff-Appellant,

v.

FREDERICK L. PIPIN, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 5793—**Charles P. Kocoras**, *Judge*,
No. 86 C 2886—**Nicholas J. Bua**, *Judge*.

ARGUED SEPTEMBER 16, 1988—DECIDED NOVEMBER 8, 1988

Before CUMMINGS, POSNER, and MANION, *Circuit Judges*.

POSNER, *Circuit Judge*. Constantine Gekas, the trustee in bankruptcy of Met-L-Wood Corporation, made sedulous

but unavailing efforts in the bankruptcy court and the district court to set aside a judicial sale of the bankrupt's bulk assets, made before his appointment as trustee. He renews his efforts in this court.

A subsidiary of a corporation owned by Frederick Pipin, Met-L-Wood manufactured laminated panels, including the patented "Sea-Lok" door for truck trailers, which is designed to prevent leaks. In 1984 Met-L-Wood began going downhill, and on November 27 and 28 of that year its two principal secured creditors informed it that it was in default and that they would conduct a public foreclosure sale on December 10. On November 28, Met-L-Wood admitted it could not cure the default and agreed to so notify its unsecured creditors, which it did by letters mailed the same day. The forthcoming sale was advertised in the *Chicago Tribune* and the *Wall Street Journal* on December 2 and 5, while on December 3 Met-L-Wood sent letters to at least 40 of its creditors announcing the date, time, and place of the sale. On December 6, having learned that a group of its unsecured creditors were planning to petition it into bankruptcy and seek to liquidate it, Met-L-Wood filed a petition for protection under Chapter 11. The petition was assigned that day (by lot) to Bankruptcy Judge McCormick. Upon the filing of the petition, the automatic-stay provision of 11 U.S.C. § 362 had kicked in, preventing the secured creditors from proceeding with the scheduled foreclosure sale. Yet Met-L-Wood did not want to block the sale (why it wanted to beat the unsecured creditors to the bankruptcy court is therefore unclear). So the next day, Met-L-Wood, together with its principal secured creditors, asked Judge McCormick to allow them to solicit bids at the previously scheduled sale. The motion was hand-delivered to unsecured creditors holding approximately $1.8 million of Met-L-Wood's total unsecured debt of $2.2 million. Judge McCormick scheduled a hearing on the motion for the morning of December 10.

That morning Met-L-Wood's counsel, the principal secured creditors, and a lawyer representing a committee of unsecured creditors who held a total of $1 million of

the company's unsecured debt appeared before Judge McCormick and urged him to grant the motion, which he did. Although the record is unclear on the point, presumably he was acting under the authority of 11 U.S.C. § 363(b)(1), which authorizes the trustee in bankruptcy (or, as was the case on December 10, the debtor in possession) to dispose of property of the bankrupt estate, other than in the ordinary course of business, "after notice and a hearing." Bids were solicited, received, and opened the same morning. The high bidder was Thomas Smith, acting as an undisclosed agent of Frederick Pipin. He bid $800,000 for the corporation's bulk assets plus its accounts receivable. Gerald Thompson bid $425,000 for the bulk assets alone. The unsecured creditors represented at the sale preferred Thompson's bid because they hoped that collection of the accounts receivable would yield enough money to leave something for them over and above the amount owed the secured creditors. The secured creditors agreed to the sale to Thompson and the next day urged Judge McCormick to approve it and he did. The accounts receivable when collected yielded a total of $800,000, but this amount plus the $425,000 that had been paid by Thompson for the bulk assets was barely sufficient to satisfy even the secured creditors' claims. The unsecured creditors were left to divide $100,000.

On June 26, 1985, six months after Judge McCormick had approved the sale, Met-L-Wood's Chapter 11 case was converted to a Chapter 7 liquidation on motion of the creditors' committee, which consisted of the eight unsecured creditors who had appeared through counsel at the hearings before Judge McCormick plus one additional unsecured creditor. Judge McCormick appointed an interim trustee pending the creditors' election of a permanent one. They elected Gekas on August 6. Gekas investigated the circumstances surrounding the judicial sale and eventually decided that there had been skullduggery of two kinds. First, Judge McCormick, who in an unrelated case had been reprimanded for an ex parte contact with a firm appearing before him (see *In re Wisconsin Steel Corp.*, 48

B.R. 753 (N.D. Ill. 1985); see also *In re X-Cel, Inc.*, 61 B.R. 691 (N.D. Ill. 1986)), had, Gekas believed, agreed to the December 10 hearing on the ex parte urging of a law firm representing Met-L-Wood (the Coffield firm—oddly, not the firm that had represented Met-L-Wood in the bankruptcy proceeding). Gekas's second charge was that the bidding had been rigged, in a scheme orchestrated by the Coffield firm to bail out Pipin and the secured creditors and leave the unsecured creditors out in the cold: Smith was a shill for Pipin, and his bid was phony because Pipin didn't have $800,000 with which to make good on it if it was accepted. How this might have helped Pipin and the secured creditors is unclear, but maybe the idea is that Smith's bid deterred others from bidding. Thompson, Gekas charged, was also in cahoots with Pipin—he was planning to sell him back the Sea-Lok operation, the only profitable part of Met-L-Wood's business. The unsecured creditors had insufficient notice and so weren't able to make their own bid or arrange for independent bidders. (We emphasize that all this is Gekas's version of the events; it is not established truth.) After the sale, Thompson did sell Pipin the Sea-Lok operation, for $120,000, and he in turn granted a security interest in the operation to Met-L-Wood's two principal secured creditors.

Armed with what he believed to be compelling evidence of the fraudulent character of the judicial sale, Gekas filed suit in federal district court against the corporation, Pipin, the Coffield firm, the two secured creditors, Thompson, and others, on April 25, 1986. The suit charged the defendants with having defrauded the unsecured creditors in violation of the RICO statute, other statutes, and Illinois common law. Three months later Gekas filed a motion in the bankruptcy court under Fed. R. Civ. P. 60(b) (which Bankruptcy Rule 9024 makes applicable to bankruptcy proceedings, with immaterial exceptions) to vacate the judgment confirming the judicial sale of Met-L-Wood's bulk assets. The bankruptcy judge dismissed the motion, noting that motions to vacate a judgment on grounds of fraud (Rule 60(b)(3)) must be filed within one year of the

judgment. Gekas appealed, and the district judge affirmed. 80 B.R. 912 (N.D. Ill. 1987). A different district judge dismissed the fraud suit. The ground for that dismissal was collateral estoppel, based on the order confirming the judicial sale. Gekas appeals both from the dismissal of his fraud suit by the district court and from the district court's affirmance of the bankruptcy judge's dismissal of Gekas's Rule 60(b) motion.

Section 363 is a new provision of the Bankruptcy Code of 1978. Before then the bankruptcy court itself was conceived to be the seller when property of the bankrupt estate was sold. These judicial sales were subject to special rules and principles many of which are no longer pertinent. Under section 363, the trustee or debtor in possession is the seller and the bankruptcy court gets involved only through the requirement of notice and a hearing. Actually the statute fails to define the court's role clearly, but the practice is that the bankruptcy judge, following the hearing, will issue an order authorizing the sale (if he decides the property should indeed be sold), and after the sale is made he will issue a second order, confirming the sale. That was the procedure followed by Judge McCormick in this case. The confirmation order is appealable as a final order under 28 U.S.C. § 158(d). *In re Sax*, 796 F.2d 994, 996-97 (7th Cir. 1986); *In re Allen*, 816 F.2d 325, 327 (7th Cir. 1987). No appeal from Judge McCormick's order was taken, however; and after the time for appeal had lapsed, the order could not be attacked in a new lawsuit brought by a party to the sale proceeding or by a successor to that party or by anyone else so far identified with such a party as to be classified as being in privity with him; such a suit would be barred by res judicata. The only other remedy would be a motion to vacate the judgment under Rule 60(b). Cf. *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1232 (7th Cir. 1986).

The unsecured creditors who appeared at the two hearings before Judge McCormick and urged him first to allow bids for Met-L-Wood's assets to be solicited and then to approve Thompson's bid were parties to the sale proceed-

ing. They are therefore barred by res judicata from bringing a lawsuit to nullify the sale. (Bringing the suit under RICO could make no difference. RICO is many things, but it is not an exception to res judicata. *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700, 705-06 (7th Cir. 1987).) If they comprised *all* the unsecured creditors, then Gekas's suit, too, would clearly be barred. The trustee in bankruptcy is the creditors' representative, *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1348-49 (7th Cir. 1987), and therefore a judgment for or against the trustee is res judicata in a suit on the same claim by a creditor, provided no conflict of interest made the trustee's representation inadequate. See, e.g., *United States v. Schnick*, 66 B.R. 491, 494-95 (W.D. Mo. 1986). The applicability of res judicata is even clearer in the converse situation—our situation—where the first suit is by the creditor and the second by the trustee. What the principal has surrendered, the agent cannot claim. See *In re Kendall Grove Joint Venture*, 59 B.R. 407, 409-10 (S.D. Fla. 1986). Gekas's contrary argument, asserting a metaphysical separation between the trustee and the creditors whom he represents, is frivolous; it would imply that no judicial order could be made binding in a bankruptcy case before a trustee was appointed—even though a trustee is usually not appointed in Chapter 11 cases, and was not in this one until the creditors decided to convert the proceeding from reorganization to liquidation. Creditors cannot exempt themselves from the consequences of their freely taken actions in a bankruptcy proceeding by the expedient of electing a trustee six months after the bankrupt's assets have been sold.

But not all the unsecured creditors were represented at the hearing that resulted in the sale to Thompson. Indeed, not all even had notice of the bankruptcy. Although all had notice before the petition for bankruptcy was filed that there was to be a foreclosure sale on December 10, the requirements for notice under section 363(b) were not met. See Bankruptcy Rules 2002, 6004(a). The trustee is their representative as well as the representative of the

unsecured creditors who were parties to the sale proceeding, so insofar as Gekas's fraud suit is on their behalf too—that is, on behalf of nonparties to the sale proceeding—it is not barred by res judicata. But it is barred. A proceeding under secton 363 is an *in rem* proceeding. It transfers property rights, and property rights are rights good against the world, not just against parties to a judgment or persons with notice of the proceeding.

We are not just invoking legal theories sanctified by Latin tags. The determining considerations are pragmatic. Often, once a petition for bankruptcy is filed, keeping the bankrupt in operation is difficult. Suppliers and customers, fearing interruption of service, may shy away and creditors be reluctant to advance fresh credit, even though such credit carries a high priority in bankruptcy. The bankrupt may be shunned like a leper. Because of these possible consequences of bankruptcy, it may make sense—not least from the creditors' standpoint—to shift the bankrupt's assets to another owner as quickly as possible, so that the business can continue in other hands than the bankrupt's, free of the stigma and uncertainty of bankruptcy. That is what the creditors told Judge McCormick should be done with the assets of Met-L-Wood. They thought that those assets and therefore their claims against them would be more valuable if the assets were sold, and sold pronto. He agreed. (On the issue when resort to section 363(b) is proper—a question on which the statute itself is silent—see *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983).) Even Gekas does not question the propriety of selling the assets, although he questions the terms of the sale. But to act swiftly and decisively required that the sale of the assets be made and approved without waiting for every last unsecured creditor to be consulted. *All* of the unsecured creditors had been notified of the foreclosure sale; *most* (by volume of credit extended) had received notice of the bankruptcy; a committee of the principal unsecured creditors had participated actively through counsel in the two hearings before Judge McCormick and urged him to approve Thompson's bid. Since unsecured

creditors are treated equally in bankruptcy (with certain exceptions, not pertinent here, for creditors who have received voidable preferences), it was a fair inference that if Thompson's bid was in the best interest of the unsecured creditors represented before Judge McCormick, it was in the best interest of the remaining unsecured creditors as well.

A sale under section 363(b) that fails to comply with the notice or hearing requirements of the statute and the applicable bankruptcy rules is invalid and may be set aside on appeal. But it is not void. This is shown by the fact that even a reversal on appeal of the order authorizing or confirming the sale will not affect the sale's validity if the buyer was acting in good faith and the sale had not been stayed pending appeal. 11 U.S.C. § 363(m). That provision is not applicable here, because the purchaser (Thompson) and everyone else involved in the sale (except the representative of the unsecured creditors!) is charged with fraud. But it expresses a highly relevant concern with the importance of finality in judicial sales in bankruptcy. See also *In re Sax*, *supra*, 796 F.2d at 998. Gekas's suit does not seek to rescind the sale. But by seeking heavy damages from the seller, the purchaser, the purchaser's purchaser (Pipin), a law firm involved in the transaction, and the secured creditors that benefited from the sale, the suit is a thinly disguised collateral attack on the judgment confirming the sale. This may be done only by the route provided for collateral attacks on judgments. After the time for appeal had run, the validity of the sale was established, even against nonparties to the sale proceeding.

Gekas's suit was properly dismissed; let us now consider whether his motion under Rule 60(b) to revoke the bankruptcy judge's approval of the sale was properly denied. There is a preliminary question. Long before there was a Rule 60(b), bankruptcy courts exercised what they conceived to be, and what in fact has traditionally been regarded as, an inherent judicial power to reconsider their judgments within a reasonable time, including judgments

confirming sales. See 4B Collier on Bankruptcy ¶ 70.98[17], at pp. 1183-94 (14th ed. 1978). Now that there is a Rule 60(b), expressly applicable to bankruptcy as we have seen, the inherent power seems otiose; and although the cases continue to refer to it, they define it in terms of Rule 60(b). See, e.g., *In re Chung King, Inc.*, 753 F.2d 547, 549-50 (7th Cir. 1985). As a natural development from those cases, as well from the text of Bankruptcy Rule 9024, which applies Rule 60(b) to bankruptcy proceedings, we hold that confirmed sales—which are final judicial orders—can be set aside only under Rule 60(b). We conclude that the old inherent power to reconsider bankruptcy orders has been merged into the rule.

If a judgment is procured by fraud, it can be set aside under Rule 60(b)(3). But that route is barred to Gekas by the one-year limitation that Rule 60(b) places on motions under subsection (3). Gekas appeals to the catch-all provision, subsection (6) ("any *other* reason justifying relief from the operation of the judgment"), which has no time limit. We have italicized the word in subsection (6) that defeats Gekas's claim. You cannot use the catch-all provision to get around the express one-year limitation on motions based on fraud in procuring a judgment. Otherwise the limitation would be nugatory.

Rule 60(b) has, however, an express exception for "fraud upon the court." It has been, for the most part, interpreted narrowly. See, e.g., *In re Whitney-Forbes, Inc.*, 770 F.2d 692, 698 (7th Cir. 1985). Otherwise it would duplicate Rule 60(b)(3)—which is itself narrowly construed, see, e.g., *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 832-33 (7th Cir. 1985). Therefore the courts have held that, other than in patent cases, where the "fraud upon the court" doctrine has been generously interpreted because Patent Office proceedings are ex parte and patent monopolies may have consequences far beyond the parties to a particular infringement proceeding, see, e.g., *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944); *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505, 509 (7th Cir. 1982), the fraud must involve corrup-

tion of the judicial process itself. *In re Whitney-Forbes, Inc., supra*, 770 F.2d at 698; 11 Wright & Miller, Federal Practice and Procedure § 2870, at p. 255 (1973).

To bring himself within this narrow exception to the one-year limitation in Rule 60(b) Gekas relies heavily on the alleged misconduct by Judge McCormick in participating in an ex parte contact. If there was such a contact, however, all it concerned (so far as we have been given any reason to believe) was the scheduling of a hearing. Given the rush that everyone was in and the fact that bankruptcy proceedings are normally not adversary and are handled less formally than ordinary lawsuits, it is hard to see any but a technical violation of the rules that forbid (with limited exceptions not applicable here) ex parte contacts with bankruptcy judges. See, e.g., Bankr. R. 9003. The fact that Judge McCormick was found to have committed a serious infraction of those rules in an unrelated case cannot bridge the gap and demonstrate fraud in this case. Moreover, as we have stressed recently, a disciplinary violation calls for discipline, not nullification of judicial proceedings, see *Bash v. Firstmark Standard Life Ins. Co.*, No. 88-1122 slip op. (7th Cir. Nov. 7, 1988); for nullification there must be prejudice to a party, and none has been shown here.

As for the allegations concerning the shill bidder and the secret plan to channel the Sea-Lok assets to Pipin (really one allegation—Pipin's secret involvement), we have difficulty understanding what the fuss is about. It is commonplace, and involves no impropriety, for the debtor himself to bid at a foreclosure sale. See 4B Collier, *supra*, ¶ 70.98 at p. 1170. Of course it would be improper for Pipin, controlling Met-L-Wood as he did, to use his control to walk off with its principal assets for a song, shucking off the unsecured creditors in the process. That would violate the fiduciary obligation that Pipin, controlling the debtor in possession, owed Met-L-Wood's creditors. See *In re Beck Industries, Inc.*, 605 F.2d 624, 635-37 (2d Cir. 1979); cf. *In re Russo*, 762 F.2d 239 (2d Cir. 1985); *In re Transcontinental Energy Corp.*, 683 F.2d 326, 328 (9th

Cir. 1982). This would be fraud against the creditors, to be sure, but we do not see how it could be thought fraud against the court without erasing the distinction between two concepts that Rule 60(b) carefully separates. Gekas's Rule 60(b) motion was properly dismissed as untimely.

The result may seem a harsh one; it may seem to illustrate the penchant of courts (as some would see it) to work injustice through technicalities. But insistence on tight deadlines is not always the sign of a Prussian soul. Unless bankruptcy sales are final when made, rather than subject to being ripped open years later, high prices will not be offered for the assets of bankrupt firms—and the principal losers (pun intended) will be unsecured creditors. The unsecured creditors in this case had plenty of time to repent themselves of having consented to—indeed urged—approval of Thompson's bid. With the assets sold, there could be no hope of reorganizing Met-L-Wood; nevertheless the creditors waited six months before asking the bankruptcy judge to convert the proceeding to a liquidation and appoint an interim trustee, which the judge promptly did. The interim trustee did nothing. Gekas, though elected early in August, did not file his Rule 60(b) motion till the following July, almost a year later and months after he had completed his investigation. And, thorough though that investigation undoubtedly was, it has turned up nothing but rumor and innuendo. The fact that Pipin wanted to buy back some of the assets of his bankrupt enterprise is not discreditable, and there is no indication that the bulk assets were worth more than Thompson bid for them. In fact, Thompson outbid a third bidder who Gekas concedes was disinterested. The foreclosure sale, of which all unsecured creditors were notified, had been widely advertised for December 10; there is no indication that any of the defendants did anything to impede or discourage the bidding that day. The circumstances merely confirm the importance of finality in bankruptcy sales.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 8, 1988.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

No. 87-3004

IN THE MATTER OF:
MET-L-WOOD CORPORATION,

Debtor.

APPEAL OF:
CONSTANTINE JOHN GEKAS, TRUSTEE.

No. 88-1051

CONSTANTINE JOHN GEKAS, TRUSTEE,

Plaintiff-Appellant,

v.

FREDERICK L. PIPIN, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 5793—**Charles P. Kocoras,** *Judge,*
No. 86 C 2886—**Nicholas J. Bua,** *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 86 C 2886

CONSTANTINE JOHN GEKAS

v.

FREDERICK L. PIPIN, et al

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff, CONSTANTINE JOHN GEKAS, Trustee, take nothing, and action is dismissed.

January 5, 1988
Date

/s/ H. STUART CUNNINGHAM
Clerk

/s/ FRANCES D'ANDREA
(By) Deputy Clerk

[Minute Order Form]

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Name of Assigned Judge: Bua

Case Number: 86 C 2886 Date: Jan. 5, 1988

Case Title: Gekas v. Pippin, et al.

MOTION: (In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented.)

* * * * *

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

The report of Magistrate Bucklo recommending dismissal of complaint is adopted in its entirety by this court. Complaint is hereby ordered dismissed.

* * * * *

(12) ☒ [For further detail see
☒ order on the reverse of

* * * * *

☐ order attached to the original order form.]

* * * * *

☒ Docketing to mail notices.

Document #273

ORDER

At its roots, plaintiff's nine-count amended complaint attacks the validity of a sale of a debtor's assets which was consented to by a committee of unsecured creditors and confirmed by a bankruptcy court. Plaintiff's claims essentially assert that defendants participated in a scheme to defraud the debtor and its unsecured creditors of their right to have the assets of the debtor sold at their fair market value. According to plaintiff, defendants schemed to rig the bidding at the liquidation sale and fraudulently effectuated the transfer of certain patents and inventory of the debtor to affiliates of the debtor's sole shareholder.

Since being appointed trustee of the debtor, plaintiff initiated two actions attacking the validity of the sale: an adversary action in the bankruptcy court pursuant to Fed. R. Civ. P. 60(b)(3) and the present action. The bankruptcy court dismissed the adversary action, *Gekas v. Met-L-Wood Corp.*, Nos. 84 B 15506, 86 A 1004 (Bankr. N.D. Ill. May 19, 1987) (Coar, J.), rejecting plaintiff's fraud argument. On appeal, the district court affirmed. *Gekas v. Met-L-Wood Corp.*, No. 87 C 5793 (N.D. Ill. Dec. 1, 1987) (Kocoras, J.). Thereafter, plaintiff filed a notice of appeal with the Seventh Circuit.

The factual assertions in the amended complaint in the adversary action mirror those contained in plaintiff's present amended complaint. The plaintiff, as trustee of the debtor, represents the interests of the unsecured creditors who consented to the sale as well as the secured creditors and sole shareholder of the debtor who are named defendants in this action. Thus, plaintiff stands in privity with the only parties who stand to benefit from this action. The essential facts upon which plaintiff's present claims rest were asserted without avail before the bankruptcy court and district court. Those judgments are now the subject of an appeal pending before the Seventh Circuit. Although this court expresses discomfort in relegating plaintiff to appealing the dismissal of his adversary

complaint, the law is clear that "only the rendering court may set aside a judgment based on fraud . . . . The aggrieved party must return to the rendering court under Fed. R. Civ. P. 60(b)(3)—within one year, at that—and not simply crank up a new suit." *Harris Trust and Savings Bank v. Ellis*, 810 F.2d 700, 705-06 (7th Cir. 1987) (finding of state court that sale of stock from trust was proper foreclosed subsequent federal securities and RICO claims under principles of issue preclusion). The magistrate was thus correct in finding the ruling of the bankruptcy court approving the sale and denying the adversary complaint precludes plaintiff from relitigating the same issues in the present action. As such, the magistrate's report and recommendation is adopted in full, and plaintiff's complaint is dismissed.

/s/ NICHOLAS J. BUA

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 2886

CONSTANTINE JOHN GEKAS, Trustee of Met-L-Wood Corporation, Debtor,

Plaintiff,

v.

FREDERICK L. PIPIN, et al.,

Defendants.

REPORT AND RECOMMENDATION
of Magistrate Elaine E. Bucklo

The plaintiff in this case is Constantine John Gekas, Trustee of the now bankrupt Met-L-Wood Corporation. The various defendants are secured creditors of Met-L-Wood Corporation and attorneys, all of whom were connected with the December 11, 1984 foreclosure sale of Met-L-Wood. Mr. Gekas has brought a multi-count lawsuit attacking that sale for fraud, alleging violations of RICO, the bankruptcy laws, collusion, breach of fiduciary duty, legal malpractice, and fraudulent conveyance. All defendants have moved for dismissal or summary judgment. Because this suit is barred by res judicata and collateral estoppel, I recommend that it be dismissed.

I.

In opposing defendants' motions, the Trustee first argues that he was not a party or in privity with a party to the December 11, 1984 sale. If this were really so,

it is difficult to understand what the Trustee is doing in this case. Privity, for collateral estoppel purposes, does not mean that the same exact parties are before the court. It does mean, however, that the parties are closely enough aligned that they represent the same legal interest. *Kunzelman v. Thompson*, 799 F.2d 1172, 1178 (7th Cir. 1986). See also *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 301 (7th Cir. 1985). This principle operates with equal force in a bankruptcy proceeding. "Privity in the *res judicata* sense generally involves a person so identified in interest with another that he represents the same legal right." *Matter of Wilcher*, 56 B.R. 428, 438 (N.D. Ill. 1985). In bankruptcy, "[t]he courts generally hold that a bankruptcy trustee is a representative of creditors, both secured and unsecured, of the bankrupt estate." *U.S. v. Schnick*, 66 B.R. 491, 494 (W.D. Mo. 1986). See also 11 A *Collier on Bankruptcy* § 7.001 (14th ed. 1978).

Mr. Gekas does not dispute that he represents the unsecured creditors of Met-L-Wood, those same unsecured creditors who consented to the December 11, 1984 foreclosure sale. With respect to the legal interests he inherited, then, it is worth noting "[t]he adversity between creditors, especially the secured vis-a-vis the unsecured, in bankruptcy can be just as polarized as if they were directly opposed to one another as plaintiff and defendant." *Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972). Moreover, that the two types of creditors were in fact polarized at the foreclosure sale is made clear in the Trustee's memorandum at 24-27. See also, Defendants' Statement pursuant to Local Rule 12(e) at 7-14.

Mr. Gekas makes much of the fact that the unsecured creditors group present at the December 11, 1984 sale was "unofficial," and that he represents a larger creditors' committee. Trustee's Memorandum at 17-19. That is not the point. It is the *interests* represented that count; that's why the doctrine of privity exists. Those interests were represented; Mr. Gekas is the successor to those interests.

II.

All nine counts of Mr. Gekas' lawsuit arise from the events surrounding the December 11, 1984 sale. All nine counts, although cloaked in RICO, collusion, and malpractice garb, are really attacks on that sale based on fraud. Federal Rule 60(b) provides the remedy for such fraud, and Mr. Gekas has availed himself of that remedy. He brought a Rule 60(b) motion before Bankruptcy Judge Coar claiming, as here, that the sale before Judge McCormick was tainted. See 86 A 1004. That cause was dismissed by Judge Coar on May 19, 1987. Mr. Gekas appealed, and the appeal is now pending before Judge Kocoras in 87 C 5793.

It is unclear on what basis Mr. Gekas thinks he can bring yet another suit, based on the same facts, and alledging essentially the same things as in the proceedings before Judges Coar and Kocoras. As the Seventh Circuit recently held in *Harris Trust and Savings Bank v. Ellis*, 810 F.2d 700, 705, 708 (7th Cir. 1987), "only the *rendering* court may set aside a judgment based on fraud .... The aggrieved party must return to the rendering court under Fed.R.Civ.P. 60(b)(3)—within one year, at that—and not simply crank up a new suit."

Since the essence of this suit is that defendants committed fraud on the unsecured creditors in representations before the bankruptcy court leading up to the approval by that court of the December 11, 1984 sale, and that claim has been resolved against the Trustee, his remedy lies in his appeal to the district court in 87 C 5793. Claim preclusion prevents him from relitigating his case in this forum. *Id.* at 706. Accordingly, I recommend that this case be dismissed.

/s/ ELAINE E. BUCKLO
ELAINE E. BUCKLO
United States Magistrate

Dated: October 5, 1987

Written objections to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed with the Honorable Nicholas J. Bua within ten (10) days after service of this Report and Recommendation. *See* Fed.R.Civ.P. 72(b). Failure to object will constitute a waiver of objections on appeal.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 86 C 5793
(84 B 15506)
(86 A 1004)

Constantine John Gekas

v.

Met-L-Wood Corporation et al

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the decision of the Bankruptcy Court is affirmed. Enter final judgment pursuant to Fed.R.Civ.P. 54(b).

December 1, 1987
Date

/s/ H. STUART CUNNINGHAM
Clerk

/s/ *Illegible*
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 87 C 5793
No. 84 B 15506
No. 86 A 1004

CONSTANTINE JOHN GEKAS, Trustee of Met-L-Wood Corp., Debtor,

Plaintiff/Appellant,

v.

MET-L-WOOD CORPORATION, et al.,

Defendants/Appellees.

MEMORANDUM ORDER

CHARLES P. KOCORAS, District Judge:

Plaintiff-appellant Constantine John Gekas ("Trustee"), Trustee in Bankruptcy of debtor Met-L-Wood Corporation ("Met-L-Wood"), is appealing the May 19, 1987 dismissal of Bankruptcy Adversary Action No. 86 A 1004 and the First Amended Complaint therein by the Honorable David A. Coar for the United States Bankruptcy Court. For the following reasons, the decision of the bankruptcy court is affirmed.

FACTS

Debtor Met-L-Wood was a Chicago corporation engaged in the production of laminated trailer doors and partitions, and was part of a group of corporations controlled by Frederick L. Pipin. On December 6, 1984, Met-L-Wood filed a voluntary bankruptcy petition under Chapter 11 of the United States Bankruptcy Code. The filing came

after Met-L-Wood's secured creditors, American National Bank ("ANB") and Moramerica Capital Corporation ("Moramerica"), had declared their loans to Met-L-Wood to be in default and scheduled a public foreclosure sale for December 10, 1984, and after a group of Met-L-Woods' unsecured creditors threatened to file an involuntary bankruptcy petition against Met-L-Wood.

On Friday, December 7, 1984, Met-L-Wood, ANB and Moramerica filed and served a joint emergency motion which scheduled a hearing before the Honorable Charles B. McCormick, the bankruptcy judge to whom the case had been randomly assigned, early on the next court day, Monday, December 10. The hearing was requested to determine whether the previously scheduled public sale of assets could go forward later that same day. Judge McCormick granted the motion following the hearing, at which the group of unsecured creditors was represented by counsel.

The auction was conducted as scheduled on December 10th, and the sale of assets was approved by the bankruptcy court the next day, December 11th. The sale was closed on December 12th.

The sale and the subsequent order are the main focus of Trustee's complaint in this case. On July 31, 1986, Trustee and a committee of unsecured creditors of Met-L-Wood ("the Creditors' Committee") filed a joint motion in bankruptcy court requesting that the court set aside, based on alleged "fraud upon the court"[1] under Federal Rule of Civil Procedure 60(b) and Bankruptcy Rule 9024, Judge McCormick's December 11, 1984 order approving the sale. Judge McCormick converted the joint motion into an adversary proceeding.

The defendants eventually moved to dismiss the joint motion. Bankruptcy Judge Coar[2] granted the defendants' motion on February 27, 1987, and made contemporaneous oral findings of fact and conclusions of law. Judge Coar first found that the Rule 60(b) Joint Motion was untimely because it was filed one year and seven months after

entry of the December 11, 1984 order approving the sale of assets by Met-L-Wood, well outside of the one-year limitation of Rule 60. Second, the court ruled that the complaint was insufficient and failed to state a claim upon which relief could be granted. The court noted that it construed the complaint in the light most favorable to the Trustee and the Creditors' Committee, but that they had "not demonstrated to the Court that they could allege facts which would cure the complaint's deficiencies." February 27, 1987 Transcript at 6.

Trustee and the Creditors' Committee thereafter moved for leave to file an amended complaint with the bankruptcy court. The defendants filed memoranda opposing the motion. Judge Coar treated the memoranda as motions to dismiss the amended complaint, a procedural posture that he considered to be the "most manageable." May 1, 1987 Transcript at 4. After explaining his reasons for dismissing the amended complaint, Judge Coar stated:

> I am going to deny the motion for leave to file the first amended complaint. And in doing so, to the extent that it was not clear the first time, let me make it clear this time that . . . I am treating this as a motion to dismiss the first amended complaint. And I am dismissing the action this time.
>
> There is no further—there is no right to file additional amendments.

May 1, 1987 Transcript at 7. The Trustee then appealed to this Court.

DISCUSSION

This Court sits as an appellate court for the decisions of the bankruptcy court. Bankruptcy Rule 8013. As such, a district court must accept the bankruptcy court's findings of fact as true unless they are "clearly erroneous." *Id.* Questions of law, however, are subject to *do novo* review. *In re Sanabria*, 52 B.R. 75, 76 (N.D. Ill. 1985); *see also Matter of Evanston Motor Co., Inc.*, 735 F.2d 1029, 1031 (7th Cir. 1984).

Only in limited circumstances should a court take the extraordinary step of setting aside a confirmed judicial sale in bankruptcy. *In the Matter of Whitney-Forbes*, 770 F.2d 692, 695-96 (7th Cir. 1985); *In the Matter of Chung King, Inc.*, 753 F.2d 547, 549 (7th Cir. 1985). While the presence of fraud occasionally may justify such a step, those occasions are strictly limited by Federal Rule of Civil Procedure 60. Bankruptcy Rule 9024 makes Rule 60 applicable to bankruptcy cases. 11 U.S.C. Rule 9024. The relevant portions of Rule 60 read as follows:

> (b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reasons justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court.

Rule 60 makes it clear that if the basis for the requested relief is fraud, misrepresentation, or other misconduct by an adverse party, then the motion must be made no more than one year after judgment was entered. The one-year limitation of Rule 60(b) does not apply, however, under those rare circumstances where there has been a "fraud upon the court." Fraud upon the court

> involves a particular type of fraud which is "directed to the judicial machinery itself" . . . and which involves circumstances where the impartial functions of the court have been directly corrupted. . . . The cases where it has been found have involved the most egregious conduct involving "corruption of the judicial process itself," . . . such as bribery of a judge and improper influence with the court.

Whitney-North, 770 F.2d at 698 (citations omitted). It is possible, of course, to have fraud between the parties without there being a fraud upon the court.

Due to the seriousness of the accusation, the pleading requirements for fraud are stricter than are the requirements for most other types of claims. Rule 9(b) requires that "the circumstances constituting fraud or mistake . . . be stated with particularity" by the complaining party. When a party seeks to impeach an order of a court, it bears "a heavy burden both of particularized pleading and of proof." *Kenner v. Commissioner of Internal Revenue*, 387 F.2d 689, 691 (7th Cir.), *cert. den.*, 393 U.S. 841 (1968). The movant must set forth specific facts impugning the official record. *Id.* A statement of "clear and convincing probative facts" is necessary for a Rule 60(b) motion to be sufficient. *DeVito v. Fidelity and Deposit Company*, 361 F.2d 936, 939 (7th Cir. 1966).

Although much time was spent by the parties arguing other points, the real issue in this case is fairly straightforward: whether the Trustee made allegations in the bankruptcy court sufficient to state a claim for fraud upon the court. Trustee argues that the amended complaint was sufficient and that the decision of the bankruptcy court should be reversed, the adversary action reinstated, and the case remanded for future proceedings. The court below, however, twice ruled that the Trustee did not state a claim, and this Court agrees with those rulings.

The Trustee's amended complaint does not make the particularized showing of clear and convincing probative facts necessary to satisfy the pleadings requirements for

the narrow claim of fraud upon the court. The doctrine has been limited to cases where "the impartial functions of the court have been directly corrupted." This usually involves bribery or improper influence with the court. *Whitney-Forbes*, 770 F.2d at 698. The amended complaint fails to allege sufficiently this type of fraud.

Trustee's allegation that "someone improperly contacted Judge McCormick, either personally or through his staff, and obtained a scheduling of a motion" (Amended Complaint at ¶ 55) is insufficient to allege fraud on the court, either when viewed by itself or in relation to the other allegations contained in the complaint. Rule 9(b) and the relevant case law require more than such a vague, general allegation. There is no indication from the complaint that this possible "*ex parte* communication" concerned the merits of the case, or anything more than the scheduling of a hearing for December 10, 1984. It does not even allege with certainty that the judge was personally spoken with about scheduling the hearing.

The Trustee claims in ¶ 53 of the amended complaint that Nachman, Munitz & Sweig, Ltd. ("the Nachman firm"), the law firm that represented ANB, had engaged "in a series of *ex parte* and improper contacts with Judge McCormick in at least one other case pending before him." In his brief filed with this Court, Trustee explains that he is referring to the situation detailed in *In re Wisconsin Steel Corp.*, 48 Bankr. 753 (N.D. Ill. 1985). He contends that due to the involvement of Judge McCormick and the Nachman firm in *Wisconsin Steel*, "the inference of more serious improprieties certainly exists" here.

This argument is unavailing. *Wisconsin Steel* is entirely unrelated to the present case and the situation there does not create an inference that improprieties exist here. Furthermore, it is this type of vague accusation that the pleading requirements for fraud are meant to discourage. If the reference to *Wisconsin Steel* was meant to suggest some "improper influence with the court," then it was clearly an insufficient method of so doing.

The complaint does not allege that the defendants made affirmative misrepresentations to the court, despite the

Trustee's current arguments to the contrary. The complaint clearly alleges that the defendants' plan was never disclosed to Judge McCormick. Mere failures to disclose facts, while certainly not laudable, do not constitute fraud of the type necessary to state a claim for fraud upon the court. *See e.g. M.W. Zack Metal Co. v. Int'l Navigation Corp.*, 675 F.2d 525, 529 (2nd Cir. 1982); *Kerwit Medical Products, Inc. v. N & H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980); *Budge v. Post*, 544 F. Supp. 370, 377 (N.D. Tex. 1982); *United States v. Int'l Telephone & Telegraph Co.*, 349 F. Supp. 22, 29 (D. Conn. 1972), *aff'd mem. sub nom. Nader v. United States*, 410 U.S. 919 (1973).

The Trustee contends that the outcome of this case is controlled by *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997 (1944). The Court disagrees. *Hazel-Atlas* is viewed by some to be an extreme and perhaps unjustified application of the fraud upon the court doctrine. *See e.g. USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505 (7th Cir. 1982); 7 Moore & Lucas, Moore's Federal Practice 512-13 (2nd ed. 1982); 11 Wright & Miller, Federal Practice and Procedure 2870, at pp. 255-56 (1973). Furthermore, the situation there was more outrageous than the one found here. There was no question of the sufficiency of the pleadings in *Hazel-Atlas*. "[I]ndisputable proof of the . . . facts" was brought out in an antitrust prosecution which took place subsequent to the entry of judgment for Hartford in the original civil patent case. *Hazel-Atlas*, 322 U.S. at 243, 64 S.Ct. at 1000. One of Hartford's attorneys had secretly written an article proclaiming the uniqueness and importance of the device that was the subject of the patent action, and had persuaded an ostensibly neutral and expert third-party to sign the article as his own. The attorney then induced the Court of Appeals to rely on the article in reaching its decision. Hazel-Atlas, the party that moved for the judgment to be vacated, presented "conclusive" evidence of this to the Court, clearly stating a claim, and the motion was decided based on the pleadings, exhibits and affidavits of the parties. The present case is entirely different. The complaint does not allege that the lawyers made

misrepresentations to the bankruptcy court. There is certainly no "indisputable proof" of what is alleged. The Trustee has not even alleged facts sufficient to state a claim. *Hazel-Atlas* therefore cannot be said to control the outcome here.

CONCLUSION

The doctrine of fraud upon the court is narrow and limited in scope. Not every allegation of fraud rises to the level of a fraud upon the court. A complaint may state a claim for fraud between the parties, yet still fail to state a claim for a fraud upon the court. Fraud upon the court must be pled with the requisite specificity. The bankruptcy court found that the Trustee's joint motion and amended complaint failed to state a claim for fraud upon the court, and after reviewing the pleadings this Court finds no reason to reverse those decisions. Accordingly, the decision of the bankruptcy court is affirmed.[3]

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
United States District Judge

Dated: December 1, 1987

[1] On April 25, 1986, Trustee filed a complaint in this district against several defendants, including ANB, Moramerica, Pipin, Gerald Thompson, Tom Smith (one of the bidders at the December 10, 1984 auction), and their respective companies for violations of federal bankruptcy and racketeering laws, as well as Illinois statutory and common law, all stemming from the December, 1984 sale to Thompson. The case was assigned to Judge Bua (No. 85 C 2886) and motions to dismiss are currently pending. The defendants in case no. 85 C 2886 intervened in the adversary action in the bankruptcy court.

[2] The *Met-L-Wood* case was eventually assigned to Bankruptcy Judge Coar following Judge McCormick's retirement from the bench.

[3] Because the decision of the bankruptcy court is affirmed, the Court declines to rule on the other issues raised by the defendants in their briefs.

[1] * IN THE
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of:
MET-L-WOOD,

Debtor.

No. 86 A 1004
(84 B 15506)
Judge Coar
May 1, 1987
11:00 a.m.

BEFORE THE HONORABLE DAVID H. COAR

APPEARANCES:

MR. DANIEL A. ZAZOVE
on behalf of the debtor;
MR. ADRIENNE HARVITT
on behalf of the Trustee;
MR. JEFFREY C. BLUMENTHAL
on behalf of American National Bank;
MR. BEN WEBBER
on behalf of Gerald Thompson and MLW Products;

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* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

MR. MATTHEW KENNELLY
on behalf of Frederick Pipin;
MR. JOHN G. FURLOW
on behalf of MorAmerica Capital;
MR. JOSEPH LINKLATER
on behalf of Stephen Slavin;
[2] MR. JOSEPH RANDALL
on behalf of Coffield Ungaretti, Harris & Slavin;
MR. DAVID KURTZ
MR. LEWIS S. ROSENBLOOM
as former counsel to American National Bank.

[3] THE CLERK: 86 A 1004, Met-L-Wood.

MR. KENNELLY: Good morning, your Honor. Matthew Kennelly on behalf of Frederick Pipin.

MR. FURLOW: Good morning, your Honor. John Furlow for MorAmerica Capital Corporation.

MR. LINKLATER: Good morning, your Honor. Joe Linklater for intervenor Salvin.

MS. HARVITT: Good morning, your Honor. Adrienne Harvit on behalf of the Trustee.

MR. BLUMENTHAL: Jeff Blumenthal, your Honor, on behalf of American National Bank.

MR. ZAZOVE: Daniel A. Zazove on behalf of the debtor.

MR. KURTZ: David Kurtz appearing on behalf of American National Bank.

MR. ROSENBLOOM: Good morning, Judge Coar. Lewis S. Rosenbloom of Winston & Strawn, consolidated with Nachman, Munitz & Sweig, formerly counsel to American National Bank.

MR. RANDALL: Joseph Randall on behalf of Coffield, Ungaretti, Harris & Slavin.

MR. WEBBER: Good morning, your Honor. Ben Webber on behalf of MLW Products and Gerald Thompson.

THE COURT: This comes up on the motion of [4] the Trustee for leave to file an amended complaint. A number of issues, memoranda, have been submitted by the parties; a number of issues have been raised. And the essential question is whether or not under Rule 60(b)—well, let me say this.

I am treating this motion for leave to file an amended complaint, in effect, and the objections thereto, as motions to dismiss the amended complaint. Now, it seems to me procedurally that puts the issue in a posture that we could—that is most manageable.

The question—the essential question is whether or not the amended complaint alleges facts sufficient under Rule 60(b) to justify a finding of fraud on the court.

When I dismissed the original complaint, it was clear from the facts the Court found, that it was filed more than a year after the order was entered. The question is whether or not there was a fraud on the court so as to take it out of the one-year requirement for filing the—filing for relief under Rule 60(b).

The Trustee alleges essentially two things different, two, by my way of thinking, inconsistent things in the amended complaint. One thing the [5] trustee says in the amended complaint: that there was a fraud on the Court—let me find it so that I state it.

Essentially, the trustee says there was a fraud on the court because during the time period in which the sale and the matters leading up to the sale took place, that there were ex parte contracts between Judge McCormick, the judge to whom the case was assigned at that time and who entered the order approving the sale, and the Nachman firm. There is no attempt to allege any connection between those ex parte contracts which are described

in Judge Grady's opinion in the Wisconsin Steel case and this case.

There is an allegation in the complaint that somebody from the Nachman firm—or somebody—contacted Judge McCormick to have the hearing on the sale set outside of the normal turn, in an hour, I believe, it was not the customary time that Judge McCormick would have heard things.

Again, there is nothing apparent—assuming that is true, there is nothing there that would suggest fraud on the Court, even if you read it in connection with the matters set forth in the Wisconsin Steel opinion.

[6] Then the trustee—the third thing that the trustee alleges that is essentialy different is that the trustee goes into more detail as to an attempt to allege schemes and artifices, fraud on the court.

Paragraph 84, the trustee says: "On December 11th, 1984, Judge McCormick held another hearing in which he was requested by the debtor, American National, and MorAmerica Corporation to approve the sale to Thompson. Again, the facts, circumstances, and agreements of the above alleged schemes and artifices to defraud was specifically and intentionally withheld and concealed from the judge and from the unsecured creditors and their counsel, all in violation of 18 USC 152 and the judge approved the sale."

Well, if there are ex parte contacts which are a part of a fraud on the Court, "the Court" taken in broad sense, and then—but the alleged schemes and artifices to defraud were withheld from the judge, it is not clear how the judge was tainted by the ex parte contracts in a way so as to create fraud on the court, especially when the trustee then later alleges that these things were specifically withheld.

And so I don't think there is anything in [7] the complaint which would satisfy the requirements of fraud upon the court as outlined in the cases cited in the opinion and order dismissing the original complaint.

For those reasons, I am going to deny the motion for leave to file the first amended complaint. And in doing so, to the extent that it was not clear the first time, let me make it clear this time that this denial is, in effect, a motion—I am treating—as I indicated, I am treating this as a motion to dismiss the first amended complaint. And I am dismissing the action this time.

There is no further—there is no right to file additional amendments.

MR. FURLOW: Thank you, your Honor.

MS. HARVITT: Thank you, your Honor.

MR. KURTZ: Thank you, your Honor.

THE COURT: Now, Mr. Blumenthal, I will need a draft order.

THE COURT: Thank you.

MR. BLUMENTHAL: Your Honor, there was one other matter up if I could ask the Court—

The trustee has not filed a report with regard to investment of funds since December 15, 1985. [8] If it is possible, we would like to know what is in the estate at this time.

MS. HARVITT: Your Honor, the Trustee's Report is due—was due yesterday. It will be filed today—

THE COURT: All right.

MS. HARVITT: —in the US Trustee's Office.

THE COURT: All right. And copies will be provided to parties?

MS. HARVITT: Well, your Honor, I think that the Rules provide that certain parts of the report get filed with the Court and certain parts get filed with the US Trustee's Office.

THE COURT: All right. Why don't you send Mr. Blumenthal a copy?

MR. BLUMENTHAL: Of the entire—

THE COURT: The entire report.

Thank you.

(Which were all of the proceedings held in the above-entitled matter.)

CERTIFICATE

I, CAROL A. RABER, hereby certify that the foregoing is a true and accurate transcript of the proceedings had in the above-entitled cause before the Honorable DAVID COAR, one of the judges of said court, at Chicago, Illinois, on May 1, 1987.

/s/ Carol A. Raber
Official Court Reporter
United States Bankruptcy Court
Northern District of Illinois
Eastern Division

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:

MET-L-WOOD CORPORATION, Chapter 7

Debtor. No. 84 F 15506

CONTANTINE JOHN GEKAS, Trustee for MET-L-WOOD, CORP., *et al.*,

Plaintiffs,

v. No. 86 A 1004

MET-L-WOOD CORPORATION, *et al.*, Judge Coar

Defendants.

ORDER

This cause coming on to be heard on May 1, 1987 before the Court on the Trustee's Motion for Leave to File First Amended Complaint, and the Objections and memoranda in support thereof filed by the defendants and intervenors-defendants thereto, and the court, having considered the record in this case, the pleadings on file, and having examined the memoranda of law filed by the parties in support of their respective positions, and having afforded the parties an opportunity to be heard, and being fully advised on the premises, and for the reasons stated in open Court,

IT IS THEREFORE ORDERED that (1) the objections and Memoranda in support thereof filed by the defendants and intervenors-defendants shall be treated as motions to

dismiss the first Amended Complaint, (2) the First Amended Complaint is hereby dismissed, (3) this adversary proceeding is hereby dismissed pursuant to Bankruptcy Rule 7041 and (4) this Order is a final appealable order pursuant to Bankruptcy Rule 8001.

ENTER:

/s/ David Coar
United States Bankruptcy Judge

DATED: May 19, 1987

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 B 15506

IN RE:

MET-L-WOOD CORPORATION, a Delaware corporation,

Debtor.

ORDER APPROVING AND CONFIRMING SALE

Upon the joint motion of Met-L-Wood Corporation, American National Bank & Trust Company of Chicago and MorAmerica Capital Corporation to approve and confirm the public sale of the debtor's assets held on December 10, 1984, after a hearing upon adequate notice, the court having read and considered the prior pleadings filed by the parties and having heard the statements of counsel and being otherwise fully advised in the premises finds that the highest and best offer received for the debtor's assets excluding certain items as more fully set forth hereinafter was made by Gerald M. Thompson in the amount of $425,000 and that it is in the best interest of the debtor, its creditors and other parties in interest that the sale to said Gerald M. Thompson be approved and confirmed.

IT IS HEREBY ORDERED:

1. That Met-L-Wood Corporation, as debtor and debtor in possession be, and it is hereby, authorized and directed to accept the bid of Gerald M. Thompson in the sum of $425,000 for all of the debtor's assets including, but not limited to, machinery, equipment, furniture and fixtures, inventory (including raw material, work in process and finished goods), contract rights, instruments, goodwill and general intangibles, patents, trademarks and tradenames, leaseholds and leasehold improvements, *provided however*, that such sale shall not include any of the debtor's accounts, accounts receivable or notes receivable (specifically

excluding that certain note evidencing the sale of the property commonly known as 401 South Railroad, Momence, Illinois, sold under Articles of Agreement for Warranty Deed to Ray Toma, d/b/a Gemini Steel). Said sale shall further exclude any and all inventory which is not located on the debtor's premises at 6755 West 65th Street, Chicago, Illinois, *provided however*, that the debtor's inventory located at London Lithograph and Production Fabricators shall be included in the sale.

2. All of the debtor's property shall be transferred to Gerald M. Thompson free and clear of any and all liens, claims and encumbrances whatsoever, *provided however*, that the property enumerated on Exhibit "A" shall be transferred subject to the outstanding security interests of The First American Bank of Bensenville and RCA Service Company, respectively.

3. This order shall constitute conclusive evidence of the sale, *provided however*, that the debtor in possession is authorized and directed to execute such documents as Gerald M. Thompson may reasonably request to effectuate the transfer of the property as contemplated by this order.

4. The proceeds received from the sale of the debtor's property shall be paid *in specia* to the American National Bank & Trust Company of Chicago, to be applied against the Bank's outstanding loans to Met-L-Wood Corporation including principal, interest, costs and fees.

5. Until further order of court, all accounts receivable shall be collected at the lock box of the American National Bank & Trust Company of Chicago and applied against Met-L-Wood's indebtedness to the American National Bank & Trust Company of Chicago until fully paid and then applied against Met-L-Wood's indebtedness to MorAmerica Capital Corporation until fully paid.

BY THE COURT:

/s/ C. McCormick
BANKRUPTCY JUDGE

DATED: Dec. 11, 1984